BASNOL ABOL & ORS

v.

THE STATE GOVERNMENT OF SARAWAK & OTHER APPEALS

FEDERAL COURT, KUALA LUMPUR
HAIDAR MOHD NOOR CJ (MALAYA)
ABDUL MALEK AHMAD FCJ
SITI NORMA YAAKOB FCJ
[CIVIL APPEAL NOS: 01-4-2003(Q), 01-5-2003(Q), 01-6-2003(Q), 01-7-2003(Q) & 01-8-2003(Q)]
6 MAY 2004

LAND LAW: *Alienation and incidents - Application for land titles - Whether state government in breach of agreements entered into with appellants by not issuing land titles to them unless premiums paid - Whether appellants required by law to pay premiums unless exempted by virtue of s. 13 of Land Code (Sarawak) - Whether payment of premium or exemption thereof within purview of Majlis Mesyuarat Kerajaan Negeri - Whether statute overrides contractual provisions*

The appellants herein were participants of a youth settlement scheme ('the scheme') established by the State Government of Sarawak ('the respondent') with the primary objective of settling rural school leavers for economic and scientific farming. For this purpose, they were allocated lots of land for cultivation and granted each a loan of RM6,800. They also signed separate deeds of agreement with the respondent. After the appellants had successfully completed the scheme and repaid the loans given to them, they applied to the respondent for documents of title for a sixty-year lease in respect of their lots of land as agreed under cl. 7 of the deeds of agreement. The respondent agreed to issue the documents of title but upon each of them paying a premium as required by cl. 13 of the Land Code (Sarawak). Section 13 thereof stipulates that any alienation of state land shall be subject to the payment of premium unless exempted by the Majlis Mesyuarat Kerajaan Negeri. The appellants refused to pay the premiums and neither did they apply for exemptions. Instead they filed an action against the respondent, the Superintendent of Land and Survey, Miri, and the Director of Agriculture for a declaration that they were entitled to the documents of title as per cl. 7 of the deeds of agreement or alternatively for loss and damages. The judicial commissioner found in favour of the appellants but that was reversed on appeal by the Court of Appeal. Hence, the appellants' appeals before this court.

Held (dismissing the appeals)
Per Abdul Malek Ahmad FCJ delivering the judgment of the court:

[1] The Government of Sarawak is a legal entity separate from the Majlis Mesyuarat Kerajaan Negeri. This is further supported by the use of the words "the Government" and "the Majlis Mesyuarat Kerajaan Negeri" separately in the Land Code (Sarawak). This means that the state government and the Majlis Mesyuarat Kerajaan Negeri are not synonymous. As such, the respondent was not under any contractual obligation to carry out the requirements of law on the alienation of state land, including to apply for the exemption of premium or to pay premium, if not exempted. (p 570 d-e)

[2] Since the respondent and the Majlis Mesyuarat Kerajaan Negeri were separate legal entities, although the latter formed part of the former, the contractual duty of the respondent was only to cause to be issued the documents of title of the lots allocated to the appellants. For this to be done, the Land Code (Sarawak) had to be complied with and the payment of premium was a requirement precedent to the alienation. However, the respondent had no say in the payment or the exemption thereof as this was within the purview of the Majlis Mesyuarat Kerajaan Negeri. There was nothing in the deeds of agreement to state that it was the responsibility of the respondent to sort out the premium issue and it was certainly not the respondent who should be instrumental in either paying the premiums or applying for the exemptions. Otherwise, the respondent would not have sent the letter to the appellants telling them of the necessity of making the premium payments. The ball was now at the feet of the appellants to apply to the Majlis Mesyuarat Kerajaan Negeri for the exemption of premium if they wanted to. (pp 570 f-h & 571 a)

[3] The *contra proferentum* rule was not applicable as the payment of premium was never the responsibility of the respondent and there was no ambiguity at all in the deeds of agreement. In any event, the general rule is that statute overrides contractual provisions. It followed therefore that the respondent had acted correctly in the circumstances. (p 571 b-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu adalah peserta dalam satu rancangan pemuda ('skim') yang ditubuhkan oleh Kerajaan Negeri Sarawak ('responden') bertujuan untuk menjadikan pelajar-pelajar lepasan sekolah luar bandar sebagai petani-petani moden. Bagi maksud tersebut, setiap perayu diberikan sebidang tanah untuk berladang serta pinjaman sebanyak RM6,800. Mereka juga menandatangani perjanjian-perjanjian yang berasingan dengan responden. Setelah perayu-perayu menyempurnakan skim dan membayar balik pinjaman yang diberikan kepada mereka, perayu-perayu memohon untuk mendapatkan suratan hakmilik 60 tahun pajakan bagi tanah-tanah mereka selaras dengan peruntukan fasal 7 perjanjian. Responden bersetuju mengeluarkan suratan hakmilik tetapi dengan syarat perayu-perayu membayar premium sepertimana yang dituntut oleh s. 13 Kanun Tanah (Sarawak). Seksyen 13 memperuntukkan bahawa suatu pindahmilik tanah kerajaan hendaklah tertakluk kepada bayaran premium melainkan jika dikecualikan oleh Majlis Mesyuarat Kerajaan Negeri. Perayu-perayu enggan membayar premium dan tidak juga memohon untuk pengecualian. Perayu-perayu sebaliknya memfail tindakan terhadap responden, Penguasa Tanah dan Ukur, Miri, dan Pengarah Pertanian memohon deklarasi bahawa mereka berhak kepada suratan hakmilik berdasarkan fasal 7 perjanjian atau secara alternatifnya untuk gantirugi. Pesuruhjaya Kehakiman membuat dapatan yang berpihak kepada perayu-perayu tetapi semasa rayuan ianya diakaskan oleh Mahkamah Rayuan. Perayu-perayu dengan itu merayu ke mahkamah ini.

Diputuskan (menolak rayuan)
Oleh Abdul Malek Ahmad HMP menyampaikan penghakiman mahkamah:

[1] Kerajaan Negeri Sarawak adalah satu entiti undang-undang yang terasing dari Majlis Mesyuarat Kerajaan Negeri. Ini disokong oleh penggunaan perkataan-perkataan "Kerajaan" dan "Majlis Mesyuarat Kerajaan Negeri" secara berasingan di dalam Kanun Tanah (Sarawak). Ini bermakna bahawa kerajaan negeri dan Majlis Mesyuarat Kerajaan Negeri bukanlah sinonim. Oleh kerana itu, responden tidak mempunyai obligasi kontrak untuk melaksanakan keperluan undang-undang berkaitan pindahmilik tanah kerajaan, termasuk untuk memohon pengecualian dari premium atau membayar premium jika tidak dikecualikan.

[2] Oleh kerana responden dan Majlis Mesyuarat Kerajaan Negeri merupakan entiti undang-undang yang berasingan, walaupun pihak terkemudian itu merupakan sebahagian pihak terdahulu, tanggungjawab kontraktual responden hanyalah untuk mengeluarkan suratan hakmilik yang diberikan kepada perayu-perayu. Untuk melakukan demikian, Kanun Tanah (Sarawak) perlu dipatuhi dan pembayaran premium adalah syarat bagi pindahmilik

tersebut. Walaupun begitu, responden tidak boleh berbuat apa-apa terhadap pembayaran premium atau pengecualian darinya oleh kerana ia adalah dalam bidangtugas Majlis Mesyuarat Kerajaan Negeri. Tiada apa-apa di dalam perjanjian yang mengatakan bahawa adalah menjadi tanggungjawab responden untuk menyelesaikan isu premium, dan responden tentulah bukan orangnya yang harus menunjukkan kesungguhan untuk membayar premium atau memohon pengecualian baginya. Jika tidak tentulah responden tidak menghantar surat kepada perayu-perayu memberitahu mereka tentang keperluan membayar premium tersebut. Bola adalah terletak di kaki perayu-perayu untuk memohon pengecualian pembayaran premium kepada Majlis Mesyuarat Kerajaan Negeri jika mereka mahu.

[3] Kaedah kontra proferentum tidak terpakai kerana pembayaran premium tidak pernah menjadi tanggungjawab responden dan tidak terdapat sebarang keraguan pada perjanjian. Walau apapun, kaedah amnya adalah bahawa statut mengatasi peruntukan-peruntukan di dalam kontrak. Ianya mengikut bahawa responden dalam halkeadaan yang wujud telah bertindak dengan betul.

Case(s) referred to:
Burns v. Ransley [1949] 79 CLR 101 ***(refd)***
Kerajaan Negeri Selangor v. Maraputra Sdn Bhd [1992] 1 CLJ 441; [1992] 2 CLJ (Rep) 630 HC ***(refd)***
Ram Nandan v. State [1959] AIR Allahabad 101 ***(refd)***
Town Investments Ltd & Ors v. Department of the Environment [1978] AC 359 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5, 6(1), (3)
Land Code (Sarawak), s. 13(1)(c)

(Civil Appeal No: 01-4-2003(Q) & Civil Appeal No: 01-5-2003(Q))
For the appellants - Fabian Lim Ann Haow (Lim Heng Choo); M/s Lim & Lim

(Civil Appeal No: 01-6-2003(Q) & Civil Appeal No: 01-7-2003(Q))
For the appellants - Mekanda Singh Sandhu (Satinder Singh Sandhu); M/s Sandhu & Co)

(Civil Appeal No: 01-8-2003(Q)
For the appellants - John Trang M/s Antalai, Trang & Co

For the respondent in all appeals - JC Fong, State Attorney General (Thomas Akin Jelimin, Senior State Legal Officer & Jonathan Jolly & Kezia Daim, State Legal Officers)

[Appeals from Court of Appeal; Civil Appeal Nos: Q-01-8-02 & Q-01-9-02]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malek Ahmad FCJ:

The twenty-four appellants are all participants of a youth settlement scheme known as the Pujut/Lopeng Youth Settlement Scheme in the Fourth Division, Miri in Sarawak. The scheme had been established by the respondent with the primary objective of settling rural school leavers and to educate and train them to undertake economic and scientific farming. The supervising authority was the State Department of Agriculture.

Except for four of the appellants namely Andy Hisham bin Basnol, who continued the action upon the death of Basnol bin Abol pursuant to order of court dated 12 January 2001, Chong Kui Hiong (hereinafter "Chong"), who replaced Kong Hee Choi pursuant to order of court also dated 12 January 2001, Intai ak Utong (hereinafter "Intai") and Junan ak Salau (hereinafter "Junan"), all the other appellants are the original settlers who had joined the scheme in three batches from 1972 until 1976. Kong Hee Choi took over from his brother Roland Kong Oh Koi who passed away on 16 June 1987. He had written to the Miri Department of Agriculture to take over his brother's place. The Miri Department of Agriculture in fact accepted payments from him but he passed away and the action was continued by his wife Chong. Intai and Junan only joined the scheme on 18 September 1985.

Training had been initially provided to the original settlers who had been selected after a course. Upon selection, they were required to actively participate in the scheme communally and individually to the satisfaction of the respondent, to abide by the respondent's advice and instructions and to diligently and conscientiously cultivate and manage the padi and coconut plantations including livestock and any other crops short term or otherwise according to the principles of good husbandry for four years. They were expected to clear the swampy land of trees and vegetation, build drains and channels and construct bunds for the planting of padi, all these with their own sweat and toil.

On 24 June 1975, all the original settlers who joined the scheme had signed separate deeds of agreement with the respondent with similar terms and conditions. Each of them received a loan of RM6,800 of which RM5,000 was meant for the construction of a house to be erected and completed after the third year of the eight year settling period and RM1,800 for the monthly subsistence at RM50 per month for the first three years of participation. Repayment was at a rate of not less than RM50 a month. Each settler had to remain active in the scheme, pay the monthly repayment commencing from the last year of the settling period or earlier, and sell his farm produce to the

cooperative society set up especially for the scheme. They were not allowed to make any structural alteration, addition or renovation to their houses or carry on other business or occupation without the permission of the respondent.

The appellants had filed an action against the respondent, the Superintendent of Land and Survey, Miri and the Director of Agriculture for a declaration that they were entitled to be issued with documents of title for the lots allocated to them under the deeds of agreement made between them and the respondent or alternatively for loss and damages *in lieu* of the issuance of documents of title pursuant to the offer letter dated 18 September 1985.

They relied on cl. 7 of the deed of agreement which reads:

> 7(a) Subject to the provisions of Clause 3(b), the Government will cause to be issued to the Borrower in the third year of the settling period a Temporary Occupation Licence each in respect of:
>
> (i) the coconut lot containing ten (10) acres more or less in the Scheme; and,
>
> (ii) the padi lot containing three (3) acres more or less in the Scheme.
>
> (b) At the expiration of the seventh (7) year after the settling period shall have been completed (but not earlier) and if the Borrower shall have fully repaid the loan to the Government, the Government will cause to be issued to the Borrower, a document of title by way of a lease for a term of sixty (60) years in respect of the coconut lot and the padi lot referred to in sub-paragraph (a) above.

In their statement of defence, the respondent and the other two defendants pleaded that the issue of document of title by way of lease is a process of alienation of State land which is governed by s. 13 of the Sarawak Land Code (hereinafter "the SLC") which stipulates that every alienation of State land shall be subject to the payment of premium. Accordingly, cl. 7(b) of the deed of agreement must not be construed such that it will nullify the express provisions of s. 13(1)(c) of the SLC with regard to the payment of premium. Further, the respondent is not barred by any act or representation of a public officer such as the Director of Agriculture from enforcing the provisions of s. 13(1)(c) of the SLC which impose the statutory provisions for the payment of premium for the alienation of State land unless exempted by the Majlis Mesyuarat Kerajaan Negeri.

It was also the respondent's case that the imposition of the premium for the alienation of State land to the appellants is not in breach of the deeds of agreement and that, by reason thereof, the court ought not exercise its judicial discretion to grant the declaratory relief sought by the appellants including the prayer for damages in lieu of the issuance of the documents of title.

The learned Judicial Commissioner in his judgment stated that there were three principal issues to be decided and they were:

(a) whether the appellants are entitled to the declaration that they are entitled to be issued with the documents of title for the respective lots allocated to them under the deeds of agreement;

(b) if (a) is answered in the positive, whether the court is empowered to make a consequential order that the respondent do issue to the appellants the documents of title to the lots in question;

(c) whether the appellants are entitled to the alternative relief of damages *in lieu* of the issuance of title to the said land.

In the consolidated actions, the learned Judicial Commissioner decided that the original settlers were entitled to be issued a document of title for the lot allocated to each of them under the scheme on the promise given by the respondent except for Chong, Intai and Junan as no promise was given to them by the respondent since they were not the original settlers.

Chong, Intai and Junan, in failing to get the declaration, and the respondent, aggrieved by the order that the other twenty-one appellants be issued with documents of title, appealed to the Court of Appeal which allowed with costs the appeal by the respondent but dismissed with costs the appeal of the three unsuccessful appellants. Dissatisfied with the outcome, all the appellants had filed a motion for leave to appeal to this court.

On 17 February 2003, this court (Mohamed Dzaiddin, Chief Justice, Haidar Mohd. Noor, Chief Judge Malaya and Steve Shim Lip Kiong, Chief Judge Sabah and Sarawak) granted the appellants leave on the following question:

1. whether the Government of Sarawak is a legal entity separate from the Majlis Mesyuarat Kerajaan Negeri?

   (a) If the answer is in the affirmative, "whether on the true construction of the agreements entered between the Government of Sarawak and the Applicants, the Government of Sarawak is under contractual

obligations to carry out all the requirements of law on the alienation of the State land, including to apply for exemption of the premium or to pay the premium, if not exempted." and

(b) if the answer is in the negative, "whether on the true construction of the agreements aforesaid, the Government of Sarawak ought to exempt payment of premium on the alienation of the State land to the Applicants".

As stated by the learned Judicial Commissioner in his judgment, the appellants' claim was as follows:

> The plaintiffs who entered into the Agreement with the defendant claimed that they have complied with all the terms and conditions thereof. All of such plaintiffs testified that they have successfully participated in the Scheme and fully repaid the loan of RM6,800.00 granted under the said Agreement. According to them although the loan were not paid according to the schedule of payment as set out under the Agreement but the same were accepted without any complaint or objection by the defendant.
>
> The plaintiffs also testified that they have actively participated in the Scheme and complied with the instructions issued by the defendant. Their performance as settlers in the Scheme was constantly monitored by the Agricultural Department. By letter of various date to each of the settlers, the Agricultural Officer in charge of the Scheme have also informed them that they have successfully passed the assessment of their work at the Scheme. They also testified that they have been issued with the temporary occupation licence in respect of the coconut lot and padi lot under clause 7(a) of the Agreement but however they were not renewed after the expiry thereof. As such they claimed that they have been denied of their legal right over the land allocated them on the failure of the defendant to issue the document of title in respect the respective lots allocated to them in accordance with the terms of the Agreement.
>
> In the case of the thirteenth plaintiff Kong Hee Choi, he claimed to have taken over his brother's place in the Scheme after his brother's death. He had also written to the Agricultural Officer, Miri for that purpose. It is not disputed that the Agricultural Department is also aware of his brother's death and that the plaintiff has taken over his place. After Kong Hee Choi's death his place at the Scheme was taken over by his wife Chong Kui Hiong who continued with this action. It is also not disputed that no notice have been issued to the said Kong Hee Choi or his wife Chong Kui Hiong not to continue staying in the Scheme. The defendant has also accepted the payment made by the plaintiff for the loan granted to his brother under the Agreement. It is the thirteenth plaintiff's case that the defendant by its action have led him to believe that he has been accepted as settlers at the Scheme and that the defendant is estopped from denying that the benefits under the Agreement have not been duly assigned to him.

The claim of the twentieth and the twenty-first defendants are based on the said offer letter dated 18 September 1985. Both the plaintiffs claimed that they have entered into a binding agreement with the defendant by exchange of letters in the terms of the said offer letter dated 18 September 1985. They also testified that they have successfully participated in the Scheme and that their participation was also assessed and found to be successful by the Agricultural Department. After their successful participation in the Scheme during the trial period the plaintiffs claimed that they are entitled to be accepted as permanent settlers and to enter into a deed of Agreement in accordance with the terms of the offer letter. They also claimed to have legitimate expectation to be issued with document of title to the respective lot allocated to them in the same manner as the other settlers who executed the Agreement with the defendant.

In addition all the plaintiffs also relied on the letter dated 27 March 2001 from the State legal officer to the plaintiffs' advocates in support of their case. By that letter the defendant communicated its decision to issue to all the plaintiffs documents of title to their respective lots in accordance with the said Deed of Agreement. The letter further stated that the issue of such documents of title constitutes an alienation of State land which must be carried out in accordance with section 13 of the Land Code. In a separate letter dated 9 May 2001 to each of the plaintiffs, the Superintendent of Land & Survey Miri again communicated the defendant's decision to issue the said documents of title to the plaintiffs for the lots occupied by them subject to certain conditions including the payment of premium at the rate of 30 per cent of the value of the lands to be alienated. These premium were calculated to be in the range of RM2,187,000.00 to RM2,776,000.00 in respect of the coconut lot and RM655,560.00 to RM990,660.00 in respect of the padi lot.

As for the respondent's case, the learned Judicial Commissioner said:

With the amendment to the defence, the defendant's case can be summed as follows. That the issue of document of title by way of lease is a process of alienation of State land which is governed by section 13 of the Land Ordinance. Under the said section 13 every alienation of State land shall, among others be subject to the payment of premium. Clause 7(b) of the Agreement must not be construed such that it will nullify the express provisions of section 13(1)(c) of the Land Code with regard to the payment of premium. The defendant, being a State Government, is not barred by any act or representation of a public officer, such as the Director of Agriculture, from enforcing the provisions of section 13(1)(c) of the Land Code, which impose a statutory provisions for the payment of premium for the alienation of State land unless exempted by the Majlis Mesyuarat Kerajaan Negeri. It is also the defendant's case that imposition of the premium for the alienation of the land to the plaintiffs is not in breach of the Agreement and that by reason thereof the court ought not exercise its judicial discretion to grant the declaratory relief sought by the plaintiffs including the prayer for damages *in lieu* of the issuance of the said documents of title.

The learned Judicial Commissioner went on to say:

> It is obvious that the declaratory judgment sought by the plaintiff under this heading is for the purpose of establishing their right and interest over the lots allocated to them under the Agreement. On this issue the learned counsels for the three consolidated actions submitted that the plaintiffs who entered into the Agreement with the defendant are entitled to the declaratory relief sought in (a) above as they have a right over the lots allocated to them by virtue of the Agreement. The learned counsels also contended that paragraph 6.2 of the defendant's re-amended statement of defence amount to an admission by the defendant that the plaintiffs are entitled to be issued with the said documents of title. Although the learned counsels agreed that the issuance of the document of titles amounted to alienation of State land under section 13 of the Land Code, but they however argued that no premium should be payable thereunder for such alienation having regard to clause 7(b) of the Agreement.
>
> The learned counsels further argued that if the Government intended to impose premium for the alienation of the said lots it would have to be expressly provided in the Agreement as it did for the term of the lease of 60 years. According to the learned counsels the imposition of the premium based on 30% the current market value of the land by the defendant is a variation of the terms of the issuance of the said title as specified in clause 7(b) of the Agreement. They pointed out no evidence on the variations of the term of the Agreement relating to the imposition of premium should be admitted by virtue of section 92 of the Evidence Act.
>
> The learned State legal officer, for the defendant, contended otherwise. It is his submission that the lots occupied by the plaintiffs are all State land and that reference to "the issuance of document of title" under Clause 7(b) of the Agreement has to be construed as alienation of State land. He further submitted that alienation of State land cannot be carried out otherwise than in accordance with the Land Code, where under section 13 thereof it is expressly provided such alienation is subject to the payment of an annual rent and unless otherwise exempted in the manner set out thereunder.
>
> On the interpretation of the said clause 7(b), the learned State legal officer argued that the fact that the Agreement is silent on the payment of premium do not entitled the plaintiffs to be exempted from the payment thereof. He further argued that the Director of Agriculture who initiated the Scheme has no authority to issue title in respect of State land. In support of his argument the learned legal officer referred to the expression used in the said clause 7(b) that "the Government will cause to be issued to the Borrower (ie, the plaintiff) a document of title by way of lease …". It is his contention that the use of the expression "caused to be issued" in the said clause clearly implied that the alienation can only be done through the Director of Land and Survey in

conformity with the requirements of the Land Code, including the payment of premium. According to him the said clause 7(b) should have read "the plaintiff will be issued with the document of title" if it is intended thereby to issue the document of title to the plaintiff.

The learned legal officer further argued that to construe that no premium is payable for the alienation of such land would have the effect of giving the said clause 7(b) an interpretation contrary to section 13(1)(c) of the Land Code. Accordingly he concluded that the defendant is not in breach of the Agreement when, in accordance with the Land Code, it calls upon the plaintiffs to pay the premium for the alienation of the respective lots allocated to them by virtue of the Agreement.

After holding that each of the deeds of agreement was made with the authority of the respondent and the respondent is bound by the terms thereof, he said:

It is also pertinent to note that the defendant in the re-amended statement of defence (made in the course of the trial) pleaded that it is now able and willing to cause the document of title to be issued to the plaintiffs in accordance with the terms of the Agreement and to the provisions of section 13 of the Land Code. As stated earlier the defendant had in fact issued the letter of offer for alienation of the respective lots allocated to the plaintiffs but however subject to the terms contained in the said letter of offer, including the payment of premium. The plaintiffs however rejected the offer on the ground, among others, that it is contrary to clause 7(b) of the Agreement.

It is now necessary to examine and interpret the said clause 7(b). The relevant phrase thereof for consideration is "the Government (the defendant) will cause to be issued to the borrower (the plaintiff) a document of title". The learned State legal officer submitted that the use of words "caused to be issued" clearly shows that the Director of Agriculture who signed the Agreement cannot alienate land what more to exempt the payment of premium. With respect such submission is in my opinion misconceived having regard to the wording of the said clause. To put it straight this Agreement is not entered between the plaintiff and the Director of Agriculture but with the defendant, being the State Government of Sarawak. I have earlier held that in the absence of any challenge to its validity the terms of the Agreement is binding upon the defendant. The undertaking to cause the issue document of title to be issued to the plaintiffs is therefore not the undertaking of the Director of Agriculture but that of the State Government. The question is whether the defendant has the authority or was acting within the scope of its jurisdiction to give such an undertaking. The short answer to me is yes since under the Land Code the entire property and control of State land is vested solely in the Government.

I also disagree with the interpretation of the expression "will cause to be issued to the borrower" as submitted by the learned State legal officer. To understand the intention of such a phrase it is necessary to define the word "cause". According to the *Concise Oxford Dictionary*, Ninth Ed, the word "cause" as a verb, means "to produce or to make happen". In my view the court can also resort to the legal interpretation of the word "cause" as used in statue. In the case of *Stiles v. Galinski, Nokes v. Islington Corpn (No 2)* [1904] 1 KB 615 Lord Alverstone CJ stated that 'the use of the word "cause" partly creates difficulty; if the word could be construed to mean "take reasonable step" the same difficulty would not arise; but I think it means more than that – it means that the person upon whom the duty is cast must see that work specified must be done'.

Likewise in my view the undertaking by the defendant under the said clause 7(b) that "it will cause to be issued to the borrower the document of title" can be interpreted to mean that the defendant will take such step as reasonably necessary or expedient to see that the said documents of title are issued to the plaintiffs. In other words it is duty of the defendant to deal with all the necessary requirement under the Land Code, including the question of premium, to see that the plaintiffs will be issued with the document of title to the respective lots allocated to them. In giving such undertaking under the Agreement it can be deemed that the defendant had exempted the plaintiff from the payment of premium for the alienation of the lots in question. Such an interpretation is also in my view consistent with the purpose for which the Scheme is established by the defendant. I am also of the view that the requirement to get the exemption of the Yang Di-Pertua Negeri under the Land Code has to be initiated by the defendant itself in order to honour its obligation to the plaintiffs under the Agreement. In the premise it is also my finding that the imposition of such premium by the defendant, who also have the authority to waive the same, is contrary to its undertaking under clause 7(b) of the Agreement.

For the reason stated above it is my finding that the plaintiffs, other than the thirteenth, twentieth and twenty-first plaintiffs, who were the original settlers of the Scheme have, by virtue of paragraph 7(b) of the Agreement, the right to be issued with the document of title to the land allocated to them in connection with the Scheme.

As for Chong, Intai and Junan, the learned Judicial Commissioner found that there was no undertaking by the respondent to cause the document of title to be issued. He accordingly dismissed their claims.

As regards the alternative relief for damages *in lieu*, the learned Judicial Commissioner stated as follows:

I however agree with the plaintiffs' contention that they are entitled to treat the Agreement as terminated since the defendant has evinced its intention not to perform its obligation under the Agreement by its conduct in imposing the payment of said premium. It is clearly within the power and authority of the defendant to waive such payment in order to give effect to its obligation and undertaking under the Agreement. Upon such breach I am of the view that the plaintiffs have rightly elected to sue for the alternative remedy for damages since they are precluded by section 29(1) of the Government Proceedings Act from seeking specific performance against the defendant for the recovery of their respective lots. Further in the instant case the plaintiffs have no right ad rem against the defendant since under the Land Code such right is only vested upon the holder of registered interest in land. The plaintiffs right are therefore merely contractual and that the relief to which they would be entitled are only in the form of damages in equity. Such relief is also consistent with the provisions of section 18(1) of the Specific Relief Act 1950 which expressly provide for the power of the court to award compensation in cases where specific performance ought not be granted. The present action is one of such case.

The Court of Appeal disagreed with the findings of the learned Judicial Commissioner. The relevant excerpt of the Court of Appeal judgment states:

This appeal revolves on the construction of clause 7(b) of the Agreement which is pivoted by the relevant provisions of the Land Code. Parties do not make contract in a vacuum. They always negotiate against the background of the law. It is therefore, reasonable to suppose that they take into account the general law in reaching their ultimate consensus. And accordingly, the proper construction of their agreement is properly influenced by the legal background against which it is made (see the Interpretation of Contracts 2nd ed. by Kim Lewison, Q.C. paragraph 3.04 at page 73). To my mind, the legal background is this. The law governing the Agreement, in particular clause 7(b) on the issuance of the documents of title is the Land Code. The relevant provisions of the Land Code are sections 13(1) and 44.

Section 13(1) provides:

13(1) Subject to the direction of the Minister under subsection (1A) of section 3, the Director may alienate State land, other than Native Customary Land; and

(a) in perpetuity or for such terms as may be fixed by rules made under this Code for the respective classes of land referred to in such rules;

(b) in consideration of the payment of an annual rent;

(c) in consideration, unless the Majlis Mesyuarat Kerajaan Negeri thinks fit to exempt therefrom in any particular case, of the payment of a premium, and where the alienation has been made in consideration of the payment of a premium, the amount of the premium shall be stated. The payment of the premium, if any, may be made either by a single payment or by instalments over a period not exceeding ten years as may be determined by the Superintendent;

And section 44 states:

44. No person shall acquire any right or title against the Government by virtue of any adverse possession, unlawful occupation or occupation under temporary licence, and no right or title shall be acquired against the Government, save such right or title as may be lawfully granted under this Code.

The lots occupied by the Plaintiffs are State land. The obligation to issue the documents of title to the Plaintiffs undertaken by the 1st Defendant under clause 7(b) of the Agreement amounted to alienation of the State land. The alienation of State land can only be done in accordance with the Land Code (per Raja Azlan Shah (CJ Malaya) (as His Highness then was) in the Federal Court case of *Sidek bin Haji Muhamad & 461 Ors v. The Government Of The State Of Perak & Ors, supra)*. In that case His Lordship states at page 314:

Assuming what the State Director of Lands and Mines said in the Utusan Melayu is true, can he bind the State Government? The short answer is that he had no authority to bind the government to alienate State land to the settlers. For this a formal resolution of the State Authority is necessary. The want of authority was clearly pleaded, and is a formidable obstacle to any contention that the appellants' claim lay in estoppel.

The only way to obtain State land is by way of the National Land Code. The case falls within the board principle that 'where an Act creates an obligation, and empowers the obligation in a specified manner, we take it as a general rule that performance cannot be enforced in any other manner": (see *Doe d. Rochester (Bp.) v. Bridges* 109 ER 1001, 1006). Likewise here in the case of landless. It cannot have been intended by Parliament in enacting the National Land Code that every person who was in need of land should be able to sue the government for it or to take the law into his own hands for the purpose. So the courts must, for the sake of law and order, take a firm stand. We can sympathise with the plight in which the appellants find themselves. But we can go no further. They must make their appeal for help elsewhere, not to us.

The decision was followed by the Federal Court in *Government Of Negeri Sembilan & Anor v. Yap Chong Lan & Ors* And *Lesco Development Corp. Sdn. Bhd. v. Yap Chong Lan supra*. That being the case, under section 13(1) of the Land Code the Director of Lands and Surveys is required by law to alienate the State land in consideration of an annual rent and, unless exempted, a premium. The power to exempt the payment of the premium vests solely with the Majlis Mesyuarat Kerajaan Negeri which is a separate entity from the State Government, that is to say, the 1st Defendant. The State Government which is not synonymous with the Majlis Mesyuarat Kerajaan Negeri has no power to grant the exemption (see *Stamford Holdings Sdn. Bhd. v. Kerajaan Negeri Johor & Ors* [1995] 3 CLJ 114 and *Steven Phoa Cheng Loon v. Highland Properties Sdn Bhd* [2000] 4 MLJ 284), nor can the State Government bind the Majlis Mesyuarat Kerajaan Negeri in respect of the exemption of the premium. So are the 2nd and the 3rd Defendants. Hence, at the most the obligation of the 1st defendant under clause 7(b) of the Agreement is to alienate the lots to the Plaintiffs, which it had agreed to do, through the Director of Lands and Surveys by the issuance of the documents of title to the Plaintiffs by way of a lease for a term of sixty (60) years subject to the payment of annual rent and unless exempted by the Majlis Mesyuarat Kerajaan Negeri, the premium. Such obligation cannot be construed in any other way otherwise it will be contrary to law. Moreover, the general rule is that statute overrides contractual provisions (see *Kerajaan Negeri Selangor v. Maraputra Sdn Bhd* [1992] 1 CLJ at page 443).

Therefore, with due respect, the learned Judicial Commissioner erred when he concluded that in giving such undertaking in the Agreement it can be deemed that the 1st Defendant had exempted the Plaintiffs from the payment of premium for the alienation of the lots. In other words, the learned Judicial Commissioner had added something in the clause which was not there. Such conclusion tantamounts to the inclusion of intrinsic evidence which is not permissible under section 92 of the Evidence Act 1950. Further, the conclusion also tantamounts to a waiver of the payment of premium, as such, it tantamounts to a usurpation by the Court of powers exclusively vested in the Majlis Mesyuarat Kerajaan Negeri and therefore, would be ultra vires the provision of section 13(1)(c) of the Land Code.

With regard to section 44 of the Land Code, the section is in *pari material* with section 48 of the National Land Code in relation thereto the Federal Court held in *Government Of Negeri Sembilan & Anor v. Yap Chong Lan & Ors* and *Lesco Development Corpn. Sdn Bhd v. Yap Chong Lan*, *supra* at page 128:

> Section 48 prescribes that no title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever … These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity to the respondents' claim. There can be no intervention of equity in the face of specific legislative provisions of the Code.

a By the section and the decision the door is sealed for the Plaintiffs to acquire title to the lots in any other way except through the provisions of section 13(1)(c) of the Land Code.

Therefore, the imposition of the premium by the Defendants as required by law does not amount to a variation of the terms in the Agreements, as such, b there is no breach or repudiation of the Agreement on the part of the Defendants.

In conclusion, with respect, the declaratory order made by the learned Judicial Commissioner cannot be justified and upheld, in which event, the order on damages cannot stand. Therefore, the appeals are allowed with costs here and c below. The orders of the learned Judicial Commissioner are hereby set aside.

In essence, all that the appellants were required to do under the scheme was to actively cultivate the lots allocated to them continuously for fifteen years and repay the RM6,800 loan to the respondent after which the respondent will cause to be issued to the appellants a document of title for a sixty year lease. d

On 24 May 1986, the respondent wrote to each of the appellants to congratulate them on the successful completion of the scheme and that the land grant would be due by 1987 subject to the repayment of the RM6,800 loan.

e On 25 August 1994, the appellants applied for the land titles to be given to them under cl. 7 of the deeds of agreement. On 18 November 1994, the respondent rejected the application without giving any reasons and thereby repudiated the contract with the appellants. The issue of land premium was not raised by the respondent.

f On 9 January 1995, the respondent wrote to the Land and Survey Department to reiterate that the respondent had decided that the land titles could not be issued to the appellants. No reasons were given and the issue of land premium was not raised by the respondent.

In July 1997, the repudiation of the deeds of agreement by the respondent was g further confirmed when the respondent requested each of the appellants to complete and submit an inquiry form whereby they were asked to state the value of compensation for crops, house and land for vacating their respective lands in the scheme. The respondent subsequently approved a different plan for the entire scheme area for development of government institutions or road h construction thereby evincing a clear intention no longer to be bound by the deeds of agreement to issue land titles to the appellants.

i

The appellants accepted the respondent's unequivocal repudiation by filing their writs against the respondent in October 1997 and prayed for damages *in lieu* of the land titles. On 27 March 2001, in the midst of the High Court trial, the respondent purported to offer to issue documents of title to the appellants upon each of them paying premium that ranged from a minimum of RM855,774 to RM1,013,256. This was rejected by the appellants.

To answer the question posed, it is necessary to refer to the provisions of the Constitution of the State of Sarawak (hereinafter "the Constitution"). Article 5 of the Constitution states that the executive authority of the State shall be vested in the Yang di-Pertua Negeri but executive functions may by law be conferred on other persons. Article 6(1) of the Constitution provides that there shall be a Majlis Mesyuarat Kerajaan Negeri to advise the Yang di-Pertua Negeri in the exercise of his functions. Article 6(3) of the Constitution categorically makes it clear that the Majlis Mesyuarat Kerajaan Negeri is made up of the Chief Minister appointed by the Yang di-Pertua Negeri and not more than ten nor less than four other members from among members of the Dewan Undangan Negeri appointed by the Chief Minister.

As for the meaning of the word "Government", Dixon, J in the Australian case of *Burns v. Ransley* [1949] 79 CLR 101 said at p. 115:

> In s. 24A(1)(b), (c) and (d) I take the word "Government" to signify the established system of political rule, the governing power of the country consisting of the executive and the legislature considered as an organized entity and independently of the persons of whom it consists from time to time. Any interpretation which would make the word cover the persons who happen to fill political or public offices for the time being, whether considered collectively or individually, would give the provision an application inconsistent with parliamentary and democratic institutions and with the principles of the common law, as understood in modern times, governing the freedom of criticism and of expression.

In *Ram Nandan v. State* [1959] AIR Allahabad 101 at p. 110, M.C. Desai J, in dealing with the word "Government", had this to say:

> In all these articles "Government" means the executive machinery of the Union and of the States. It means the President acting with the advice of the Council of Ministers and the Governors acting with the advice of their Councils of Ministers. It is the system of Government or the institution consisting of the President and the Governors acting with the advice of their Councils of Ministers and not the actual persons holding the offices of the President and Governors and the Ministers advising them.

The House of Lords in *Town Investments Ltd and Others v. Department of the Environment* [1978] AC 359 held *per curiam* that it is not private but public law that governs the relationships between Her Majesty the Queen acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades employed in those departments. To speak nowadays of "the Crown" as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion. It would be better, instead of speaking of "the Crown," to speak of "the government" – a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. Executive acts of government that are done by any of them, in the name of Her Majestry or under their official designation, are acts done by "the Crown" in the fictional sense in which that expression is now used in English public law.

In line with these authorities, we would say that the Government of Sarawak is a legal entity separate from the Majlis Mesyuarat Kerajaan Negeri. This is further supported by the use of the words "the Government" and "the Majlis Mesyuarat Kerajaan Negeri" separately in the SLC and hence, in our view, would mean that the Government and the Majlis Mesyuarat Kerajaan Negeri are not synonymous. As the answer is in the positive and we would have to answer paragraph (a), we would say that the respondent is not under any contractual obligations to carry out all the requirements of law on the alienation of State land, including to apply for exemption of the premium or to pay the premium, if not exempted.

Since the respondent and the Majlis Mesyuarat Kerajaan Negeri are separate legal entities, although the latter forms part of the former, the contractual duty of the respondent is only to cause to be issued the document of title of the lots allocated. For this to be done, the SLC has to be complied with and the payment of premium is a requirement precedent to the alienation. However, the respondent has no say in the payment or the exemption thereof as this is within the purview of the Majlis Mesyuarat Kerajaan Negeri. There is nothing in the deeds of agreement to state that it is the responsibility of the respondent to sort out the premium issue and we are justified in holding that it is certainly not the respondent who should be instrumental in either paying the premiums or applying for the exemption. Otherwise, the respondent would not have sent the letter to the appellants telling them of the necessity of making the premium

payments. The ball is now at the feet of the appellants to apply to the Majlis Mesyuarat Kerajaan Negeri for the exemption of the payments of premium if they want to.

The application of the contra proferentum rule has been raised to support the arguments of the appellants. In essence, it means that words are to be construed, in case of doubt or ambiguity, against the party who uses or drafts them.

It was urged that it should be applied in these circumstances as there is evidence on record to indicate that the deeds of agreement were drafted by the respondent. From the clause that the respondent would "cause to be issued to the Borrower, a document of title by way of a lease for a term of sixty (60) years", it was argued that it was apparent that the respondent had considered s. 13(1) of the SLC which provides for alienation "in perpetuity or for such term as may be fixed by rules made under this Code".

It was further submitted that it was certainly open to the respondent to expressly state that the alienation would be subject to payment of premium, if so intended, just as it specified the term of the lease of sixty years, failure of which has resulted in an ambiguity which must be construed against the respondent.

However, it is our finding that the payment of the premium was never the responsibility of the respondent and there is actually no ambiguity at all in the deeds of agreement. Hence, the contra proferentum rule does not apply. In any event, we agree with the Court of Appeal that the general rule is that statute overrides contractual provisions (see *Kerajaan Negeri Selangor v. Maraputra Sdn Bhd* [1992] 1 CLJ 441; [1992] 2 CLJ (Rep) 630).

In our view, the respondent acted correctly in these circumstances and we have no qualms in agreeing with the finding of the Court of Appeal. The appeals are dismissed with costs. The deposits are to go to the respondent to the account of the taxed costs.